Public Prosecutor v Jackki bin Zainudin

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–21 OF 2009-III
RAVINTHRAN JC
9 OCTOBER 2010

Criminal Procedure — Sentence — Appeal against sentence — Rape — Whether 13 years imprisonment and ten strokes of whipping manifestly inadequate — Whether trial judge erred in imposing only ten strokes of whipping on third charge and in not imposing any whipping on two other charges — Whether trial judge applied correct sentencing principle — Whether trial judge considered all relevant sentencing factors — Whether three offences were distinct — Whether concurrent or consecutive sentences should be imposed — Whether appellate interference warranted — Criminal Procedure Code s 388

The respondent was caught having sexual intercourse with his sister-in-law ('the victim'), aged 15 years eight months, in the room of a house he shared with his wife and other members of her family. The respondent was charged with three counts of raping the victim on three separate occasions. He pleaded guilty to the three charges and was sentenced to a term of 11, 12 and 13 years imprisonment for each of the three charges and ten lashes of the whip for the third charge. The sessions court judge ('SCJ') also ordered all the imprisonment terms to run concurrently, which meant that the respondent would serve 13 years imprisonment only. This was an appeal by the prosecution against the sentence imposed on the respondent. The prosecution submitted that the SCJ had erred in imposing only ten strokes of whipping on the third charge and in not imposing any whipping on the two other charges. It was also argued that the sentence of ten strokes of whipping was manifestly inadequate in this case. The prosecution further argued that the three offences of rape were distinct and therefore concurrent sentences should not be imposed.

Held, dismissing the appeal:

(1) Since s 388 of the Criminal Procedure Code had rendered the mandatory stipulation of ten strokes per offence impossible to be complied with, the lower court had the discretion not to impose it on all the charges. The SCJ imposed the statutory minimum of ten strokes of the whip on only one charge (see para 6).

(2) It is trite law that the appellate court would not interfere with the sentence imposed by the trial court merely because it was of the opinion that a heavier penalty should have been imposed. The normal ground of interference is when the trial court had applied the wrong principle or

had not considered all the relevant sentencing factors. In the instant case, the SCJ had noted that the respondent did not physically force the victim who had appeared quite compliant. Although the prosecution had cited a number of incest cases where the courts had imposed more than ten strokes of the whip, these could be easily be distinguished from the instant case by the degree of violence and the degree of kinship of the respondent to the victim. In the present case, the lack of physical violence and the degree of kinship between the respondent and the victim led to the SCJ imposing ten strokes of the whip for the third charge. It was found that the SCJ had applied the correct sentencing principle and had not imposed a whipping punishment that was manifestly inadequate. Thus, appellate interference was not warranted (see para 8).

(3) The totality principle, which required the sentencing court to consider whether the cumulative term of imprisonment was excessive and could exceed the normal life expectancy of the accused, was a very practical principle applied in numerous local cases. In the instant case, the sentences imposed by the SCJ on the three charges add up to 36 years imprisonment. After having considered all the relevant facts of this case including the age of the respondent, the absence of physical violence and his plea of guilt, which had saved the court time and expense, the SCJ had decided that 13 years imprisonment was sufficient. This court found that in the circumstances of this case the sentence imposed was not manifestly inadequate. Thus, this court had no reason to vary the SCJ's order that the sentences run concurrently (see para 10).

[Bahasa Malaysia summary

Responden ditangkap melakukan hubungan seks dengan adik iparnya ('mangsa') berumur 15 tahun lapan bulan, di dalam bilik sebuah rumah yang dikongsi bersama isterinya dan ahli-ahli keluarga yang lain. Responden dituduh dengan tiga tuduhan merogol mangsa dalam tiga kejadian yang berasingan. Dia mengaku bersalah terhadap ketiga-tiga tuduhan tersebut dan dihukum penjara untuk tempoh 11, 12 dan 13 tahun untuk setiap ketiga-tiga tuduhan tersebut dan sepuluh sebatan untuk tuduhan ketiga. Hakim mahkamah sesyen ('HMS') juga memerintahkan kesemua tempoh penjara untuk berjalan serentak, bermaksud bahawa responden akan menjalankan hukuman penjara selama 13 tahun sahaja. Ini adalah rayuan oleh pihak pendakwaan terhadap hukuman yang dikenakan ke atas responden. Pihak pindakwaan berhujah bahawa HMS telah tersilap dalam mengenakan sepuluh sebatan rotan ke atas tuduhan ketiga dan dalam tidak mengenakan apa-apa sebatan ke atas dua tuduhan lagi. Ia juga dihujahkan bahawa hukuman sepuluh sebatan rotan adalah nyata tidak mencukupi dalam kes ini. Pihak pendakwaan selanjutnya berhujah bahawa ketiga-tiga kesalahan merogol adalah berbeza dan oleh itu hukuman yang berjalan serentak tidak patut dikenakan.

Diputuskan, menolak rayuan:

(1) Memandangkan s 388 Kanun Acara Jenayah telah mengenakan

A ketetapan mandatori sepuluh sebatan untuk satu kesalahan adalah mustahil untuk dipatuhi, mahkamah rendah mempunyai budi bicara untuk tidak mengenakannya ke atas kesemua tuduhan tersebut. HMS mengenakan statutori minima sepuluh sebatan rotan hanya untuk satu tuduhan sahaja (lihat perenggan 6).

B (2) Adalah undang-undang nyata Mahkamah Rayuan tidak akan campur tangan dengan hukuman yang dikenakan oleh mahkamah bicara hanya kerana ia adalah kerana berpendapat bahawa penalti yang lebih berat patut dikenakan. Alasan biasa campur tangan adalah apabila mahkamah bicara telah mengaplikasi prinsip salah atau tidak mempertimbangkan C kesemua faktor-faktor hukuman yang relevan. Dalam kes ini, HMS telah mengambil kira bahawa responden tidak secara fizikal mengasari mangsa yang nampak menurut. Walaupun pihak pendakwaan merujuk beberapa kes sumbang mahram di mana mahkamah-mahkamah telah mengenakan lebih daripada sepuluh sebatan rotan, ini dengan jelas boleh D dibezakan daripada kes ini oleh tahap ganas dan tahap hubungan kekeluargaan responden dengan mangsa. Dalam kes ini, ketiadaan keganasan fizikal dan tahap hubungan kekeluargaan di antara responden dan mangsa membawa HMS mengenakan sepuluh sebatan rotan untuk tuduhan ketiga. Ia didapati bahawa HMS telah mengaplikasikan prinsip E hukuman yang betul dan tidak mengenakan hukuman rotan yang nyata tidak mencukupi. Oleh itu, campur tangan mahkamah rayuan adalah tidak wajar (lihat perenggan 8).

(3) Prinsip keseluruhan, yang memerlukan mahkamah yang menghukum mempertimbangkan sama ada tempoh penjara kumulatif adalah F berlebihan dan boleh melebihi jangka hayat biasa tertuduh, adalah prinsip praktikal yang diaplikasi di dalam beberapa kes tempatan. Dalam kes ini, hukuman-hukuman yang dikenakan oleh HMS ke atas ketiga-tiga tuduhan berjumlah kepada hukuman penjara 36 tahun. Selepas mengambil kira kesemua fakta relevan kes ini termasuk umur G responden, ketiadaan keganasan fizikal dan pli bersalah, yang telah menjimatkan masa mahkamah dan belanja, HMS telah memutuskan bahawa penjara 13 tahun adalah mencukupi. Mahkamah ini mendapati bahawa dalam keadaan kes ini hukuman yang dikenakan jelas mencukupi. Oleh itu, mahkamah ini tidak mempunyai alasan untuk H mempelbagaikan perintah HMS bahawa hukuman-hukuman dijalankan serentak (lihat perenggan 10).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 I Reissue) paras 3553–3615.

Cases referred to

Leken @ Delem ak Gerik (M) v PP [2007] 3 MLJ 730; [2007] 8 CLJ 158, HC (refd)

Manuava Venkareswarlu v State [1995] 2 Crimes (AP) 854, HC (refd)
Mohamad bin Senik v PP [2005] 4 MLJ 164; [2005] 1 LNS 74, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
R v Faulkner (1972) 56 Cr App R 594, SC (refd)
R v Roberts [1982] 1 All ER 60, CA (refd)
Tuan Mat bin Tuan Lonik v PP [2009] 4 MLJ 81; [2009] 4 CLJ 638, CA (refd)
Wong Kai Chuen Philip v PP [1991] 1 MLJ 321, HC (refd)

Legislation referred to

Criminal Procedure Code ss 282(d), 288, 288(5), 388
Penal Code ss 375(g), 376(2), (3), 376A
Subordinate Courts Act 1948 s 102

Fazillah Begum (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Respondent in person.

Ravinthran JC:

[1] This is an appeal by the public prosecutor against the sentence imposed on the respondent.

BRIEF FACTS

[2] The respondent was charged with three counts of raping his own sister in law who was aged 15 years and eight months old at the material time. He pleaded guilty to the charge and the learned sessions court judge imposed the following sentence:

(a) The first charge — 11 years imprisonment;

(b) the second charge — 12 years imprisonment; and

(c) the third charge — 13 years imprisonment and ten lashes of the whip.

[3] He ordered all the imprisonment terms to run concurrently. This means that the respondent would serve 13 years imprisonment only. The statement of facts which was admitted by the respondent revealed the following. The respondent is 23 years old whereas the victim was not yet 16 years old. She is the sister of his wife. It appears that the respondent, his wife, the victim and other members of the family lived in the same house. On three occasions this year between April and May, he is alleged to have 'persuaded' the victim into having sexual intercourse with him by cajoling (*termakan pujukan*) and threatening her. Although the element of force or coercion was not clearly stated in the statement of brief facts, the act of the respondent constituted rape

as the victim was under 16 years of age (see s 375(g) of the Penal Code). It was also the prosecution's case in the statement of brief facts that a Muslim man cannot marry his sister in law as such a marriage is proscribed by Islamic law for being within the prohibited degree of marriage. Under s 376A of the Penal Code offence of incest is defined as:

> A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

[4] The respondent admitted the fact that he had sexual intercourse with his own sister in law on the said three occasions. Therefore, the conviction of the respondent under s 376(3) is proper. Section 376(2) and (3) provide for heavier penalties for what is called 'aggravated rape' in some jurisdictions. For the offence of incest combined with rape, s 376(3) provides as follows:

> Whoever commits rape on a woman whose relationship to him is such that he is not permitted under the law, religion, custom or usage, to marry her, shall be punished with imprisonment for a term of not less than eight years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.

WHETHER PUNISHMENT INADEQUATE?

Whipping

[5] The first point of the learned DPP in her written submission and her oral argument was that s 376(3) provided for a minimum often strokes of whipping. She submitted that the learned sessions court judge erred in imposing only ten strokes of whipping on the third charge and in not imposing any whipping on the first two charges. After I pointed out to her the provisions of s 288 of the Criminal Procedure Code, she conceded that the sentencing court cannot exceed the 24 strokes limit. Section 288 reads as follows:

> 288 Mode of executing such sentence
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> (1) When the accused is sentenced to whipping the number of strokes shall be specified in the sentence. In no case shall the whipping exceed twenty-four strokes in the case of an adult or ten strokes in the case of a youthful offender, anything in any written law to the contrary notwithstanding.
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> (2) Whipping shall be inflicted on such part of the person as the Minister charged with responsibility for public order from time to time generally directs.
>
> (3) The rattan used for whipping shall be not more than half an inch in diameter.
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> (4) In the case of an accused sentenced to whipping for an offence under section 403, 404, 406, 407, 408, 409 or 420 of the Penal Code, or a youthful offender, whipping shall be inflicted in the way of school discipline with a light rattan.

(5) When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by whipping, the combined sentences of whipping awarded by the Court for any such offences shall not, anything in any written law to the contrary notwithstanding, exceed a total number of twenty-four strokes in the case of adults and ten strokes in the case of youthful offenders.

[6] In the instant case, although the charges emanated from an incestuous relationship, instead of preferring a single charge, the prosecution had decided to prefer three separate charges against the respondent. Even if it is accepted that the charges are 'distinct', the number of strokes of whipping cannot exceed 24 strokes. (A good discussion on incest and 'distinct' offences is found in the case of *Leken @ Delem ak Gerik (M) v Public Prosecutor* [2007] 3 MLJ 730; [2007] 8 CLJ 158 but I shall not belabour this point as the accused had pleaded guilty and for purpose of sentencing I shall accept the submission of the learned DPP that the three charges contain three distinct offences). In view of s 288(5) of the Criminal Procedure Code, the minimum punishment of ten strokes prescribed by s 376(3) cannot be imposed. However learned DPP urged the court to impose corporal punishment up to the limit allowed by s 388 of the Criminal Procedure Code. In my opinion, since s 388 of the Criminal Procedure Code has rendered the mandatory stipulation of ten strokes per offence impossible to be complied with, the lower court had discretion not to impose it on all the charges. The learned sessions court judge imposed the statutory minimum of ten strokes of the whip on only one charge. The next question that arises is whether the ten strokes of whipping was manifestly inadequate in this case. The learned sessions court judge apparently took into account the fact that the respondent did not use any force on the victim and that he did not inflict any physical injuries. In fact, in the statement of brief facts, it is stated that the victim had been 'persuaded' to have sexual intercourse. The absence of violence and injuries was a factor that he considered in not imposing a more severe corporal punishment. It is trite law, that the appellate court would not interfere in the sentence imposed by the trial court merely because it is of the opinion that a heavier penalty should have been imposed (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256).

[7] The normal ground of interference is when the trial court had applied the wrong principle or had not considered all the relevant sentencing factors. Rape has always been considered a serious offence which demands an immediate custodial sentence (see *R v Roberts* [1982] 1 All ER 60). Since whipping is prescribed by the Penal Code, it is almost always imposed unless it involves young lovers in what is commonly called 'statutory rape'. The reason is not difficult to fathom. Sexual intercourse without consent is an inherently violent crime. As stated in *Manuava Venkareswarlu v State of High Court of Andhara Pradesh* [1995] 2 Crimes (AP) 854 (cited in *Mohamad bin Senik v Public Prosecutor* [2005] 4 MLJ 164; [2005] 1 LNS 74):

A

> The offence of rape leaves her (the victim) with feelings of humiliation, degradation and guilt. Rape is an experience which shakes the foundations of the lives of the victims. The offence of rape must be dealt as the gravest crime against the human dignity.

B

[8] I shall now consider whether the sessions court judge's decision to impose only ten strokes of the whip is manifestly inadequate. The purpose of whipping, as provided in the Criminal Procedure Code, is retributive and preventive. It is a just dessert for a violent criminal act. It is also intended to C instill fear in others who may be tempted to commit such crimes. In the instant case, the learned sessions court judge had noted the respondent did not physically force the victim who had appeared quite compliant. He had sexual intercourse with her in the room even when other members of the family were present outside. In fact he and the victim were caught naked in the act of sexual D intercourse on the occasion of the third charge. That is when the respondent's wife slapped both of them. As I said earlier, regardless of the element of coercion, the offence constitutes rape as the victim was under the age of 16. However the point to note is the absence of physical violence and compulsion unlike in some other cases. The learned sessions court judge did address other E relevant factors in this case before he imposed the punishment. He discussed the seriousness of the offence that was committed by the respondent. He took into consideration the fact that the victim was just below 16 years old and that the respondent was the brother in law. He was fully aware that a deterrent F sentence is called for so that the right message is sent out to like minded offenders. However, he still imposed only ten strokes of the whip on the respondent because of the absence of violence. To my mind, as he had not gone wrong on principle and as the ten strokes of the whip that he imposed is sufficiently harsh, the appellate court should not interfere by imposing G additional strokes of the whip. The learned DPP had cited a number of incest cases where the courts have imposed more than ten strokes of the whip for incest cases. The offence in this case is no doubt heinous as recognised by the sessions court judge but no two cases are alike and the incest cases she cited can easily be distinguished by the degree of violence and the degree of kinship of the H accused person to the victim. Needless to say in many of these cases, biological fathers or uncles had forced or beaten their young daughters or nieces to submit to them sexually. There is certainly no physical violence in this case. The other factor is the degree of kinship. Surely a father raping or having sexual intercourse with his own natural daughter is more abhorrent and despicable I than a brother in law doing the same to his sister in law. I note that in some of the cases involving natural fathers, the courts had imposed up to 20 lashes of the whip. In concluding this part of the judgment, I find that as the learned sessions court judge had applied the correct sentencing principle and had not imposed a whipping punishment that is manifestly inadequate, appellate

interference is not warranted.

Concurrent or consecutive sentence

[9] The learned sessions court judge ordered the imprisonment terms of 11, 12 and 13 years to run concurrently. The learned DPP appealed to this court to order all the sentences to run consecutively which would mean the respondent would have to serve 36 years imprisonment. Her argument is that the three offences are distinct and therefore concurrent sentences should not be imposed. From a reading of the whole judgment of the learned sessions court judge, he had considered all the factors that I discussed earlier before he ordered the sentences to run concurrently. Although he did not state in so many words, he appeared to have had the 'totality principle' at the back of his mind. The other principle that must be considered in deciding whether concurrent or consecutive terms should be imposed is the 'one transaction' principle but it would not apply in this case as the offences were committed at different times. The 'totality principle' states that where an accused is sentenced for two or more offences in one trial, the sentencer is required to ask whether the cumulative or aggregate term of imprisonment would be excessive or constitute 'a crushing sentence' not in keeping with his record or prospects (see *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321). As asked by the Lord Chief Justice of England in *R v Faulkner* (1972) 56 Cr App R 594 at p 596:

> However, at the end of the day, as one always must, one looks at the totality and asks whether it was too much.

[10] This is a very practical principle that has been applied in numerous local cases. Failure to apply this principle can lead to a cumulative sentence that can exceed the normal life expectancy of the accused (see *Tuan Mat bin Tuan Lonik v Public Prosecutor* [2009] 4 MLJ 81; [2009] 4 CLJ 638). In that case, a cumulative term of imprisonment of 75 years was imposed on the 48 year old accused person by the trial court. In incest cases, victims may resist the urge to complain for a long period of time before spilling the beans on the perpetrator who is a close relative. Therefore the prosecution may be able to bring many charges against the accused person. Consecutive terms of imprisonment in respect of all the charges on the ground that they are distinct offences may result in a cumulative sentence that could not be completed by an accused person. Even if that were not the case, it will result in a 'crushing sentence'. I accept the submission of the learned DPP that the three charges are distinct offences and following the general principle, the sessions court judge had the discretion to impose consecutive sentences (see s 282(d) of the Criminal Procedure Code). However the Criminal Procedure Code does not require the imposition of a consecutive sentence for every distinct offence. In fact it can be argued that the 'totality principle' has been envisaged in another law, ie s 102 of

A the Subordinate Courts Act 1980. In that section which is applicable to magistrates court only, the Subordinate Courts Act 1980 permits the imposition of consecutive sentences although such an order will result in a cumulative sentence that exceeds the sentencing power of the magistrate. However in the proviso, it imposes a limit of 20 years imprisonment. B Therefore, if an accused person is sentenced for ten distinct and separate offences of armed robbery, the magistrate may exceed his ordinary sentencing power of five years and his ordinary jurisdictional limit of ten years but he may not impose a cumulative term of imprisonment that exceeds 20 years. Section 102 is only applicable to magistrates courts. However, the totality principle can C be used by the sessions court to ensure the aggregate from consecutive sentences is not excessive. In the instant case, the sentences imposed by the sessions court judge on the three charges add up to 36 years imprisonment. The sessions court judge had considered all the relevant facts of the case including the age of the accused person and his plea of guilt. The accused person is only D 23 years old. A sentence of 36 years means that he would have virtually lost the prime of his life behind bars. In addition he would have been whipped ten times. He has saved the court time and expense by pleading guilty. Such a 'crushing sentence' would not only be out of proportion to the crime he committed but also discourage other accused persons from pleading guilty. E This would have two predictable consequences. Rape victims would have to relive their ordeal in the witness stand. The other consequence is that the accused person may have a fair chance of being acquitted as rape is never easy to prove especially when the victim makes a late report. This is the reason the courts encourage a guilty plea by giving a one third or one fourth discount on F the sentence that the court would have imposed if he had claimed trial. The learned sessions court judge considered this principle in sentencing the accused person. He was of the view that 13 years imprisonment is sufficient after having considered all the facts surrounding the case including the absence of physical violence. I cannot say that he has gone wrong on principle in coming to this G conclusion. Another court, including this court may be minded to impose 15–16 years imprisonment for this offence. However that is not a reason to disturb the sentence passed by the sessions court judge as the sentence imposed is not manifestly inadequate. For that reason, I will not vary his order that the sentences in question run concurrently.

H

[11] The appeal is dismissed.

Appeal dismissed.

I

Reported by Kanesh Sundrum